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SECTION 2479, CODE OF VIRGINIA, AND ITS HISTORY.

NOTICE TO MAKE OWNER LIABLE TO SUBCONTRACTOR MAY BE SERVED AFTER PERFORMANCE.

It is contended that the preliminary notice required to be given by the subcontractor to the owner under the provisions of § 2479 of the Code of Virginia of 1904 may, as affected by present amendments, be given *before, during or after performance* and will bind all funds due to the general contractor at the time the notice is given or may thereafter become owing to him by virtue of his contract with the owner. This is in keeping with the opinion, under analogous conditions, in *Shenandoah R. R.* v. *Miller,* 80 Va. 827, 828, and is more in keeping with the tendency of the Supreme Court than that which postulates a course less favorable to the mechanic, while doing no injustice to the owner. This is the Pennsylvania system with the owner's liability limited. Its advantage over §§ 2475-2477 (the New York system), is its simplicity and economy in that no registry is required. The best argument in support of the present contention is the history of the section. If ever persistent and consistent effort evidenced an "intention" and an earnest, not to be thwarted, determination, it is presented in the interesting history made where even the work of the Revisors of 1887, that being a radical change, was not permitted long to stand. It will serve a useful purpose, in following the evolution of the statute, to observe how radical were all the changes made and also the final adoption of certain new words, manifestly to meet an old objection and contention. In the Act of 1869-70 there is required to be stated the "probable value" and a "correct account." In 1874-5 it became merely "the value," all words denoting futurity being also omitted.

In the Code of 1887 he must furnish "the probable value" "before performance" and "shall afterwards" furnish a "verified account." In 1893-4 he is required "to give the nature and char-

acter of his *contract* and the probable *amount* of his claim." (Not value.) Both the words "contract" and "amount" are new and are significant of a new policy. The words "value of the work to be done and materials to be furnished" are now changed to "probable amount of his claim," doing away with the futurity evidenced by "to be" and substituting a present existing condition— a "claim." It is fair to assume that the dignity of a "claim" exists only as to an executed contract, but that the amount is uncertain—"probable"—until approved by the general contractor, owner, and architect, when it becomes a sum certain. If "probable" be construed in connection with "amount of his claim," it loses the suggestion of futurity and denotes the present tense, which manifestly would be a solution of the contention—a solution in keeping with the intent as interpreted by the Supreme Court with reference to the Act of 1874-5, the prototype of the statute of 1893-4. The present revision of the Act indubitably is an effort to return to that doctrine, omitting the unlimited liability of the owner, which, for its conservatism and practical uses, is highly to be commended. (27 Cyc., p. 108).

SOME ILLUMINATING HISTORY.

1869-70.

The first enactment on the subject appears in the Acts of 1869-70, Ch. 294, § 3, p. 444, and is subsequently embodied. without change, in the Code of 1873, Ch. 115, § 5 as follows:

"Any subcontractor or workman, and any person contracting to furnish materials about a building or other improvement for a general contractor, or other person than the owner, may give notice in writing to the owner of such building or other improvement, stating the *probable* value of the labor *to be* performed or materials *to be* furnished, and if such subcontractor, workman, or supplier of materials, *shall afterwards perform such labor or furnish such materials,* and shall, within ten days after such building or other improvement is completed, furnish the owner there of with a correct account of the amount due to said party by the contractor and remaining unpaid the owner shall be liable, etc." (Italics mine.)

1874-5.

At the session of 1874-5 (Acts, p. 437), the Code of 1873 was amended so as to read as follows:

"Any subcontractor or any person contracting to furnish materials about a building or other improvement, for a general contractor, or other person than the owner, may give notice in writing to the owner of such building or other improvement, stating the value of the labor performed or materials furnished, and shall, within twenty days after such building or other improvement is completed, *or work thereon otherwise terminated,* furnish the owner thereof with *an affidavit* showing a correct account of the amount due to said party by the contractor and remaining unpaid to the subcontractor or person contracting to furnish materials, and the said owner shall be liable for the amount of such claim to said subcontractor or person contracting to furnish materials, provided the same does not exceed the amount named by the said claimant in the affidavit hereinbefore required. * * *" (Italics mine.)

So amended, it was contended that "the notice and affidavit must be furnished *after,* and *not before,* the entire completion of the work by the general contractor." The Court denied the contention in *S. V. R. R. Co.* v. *Miller,* 80 Va. 827, 828, and in *Roanoke Co.* v. *Karn and Hickson,* 80 Va. 589.

THE RESULT.

It will be observed that there were omitted, by the amendment, the words "probable," "to be" and "shall afterwards perform such labor or furnish such materials," leaving no possible doubt of a determined intention to permit the giving of the notice *before, during and after* performance and at any time before thirty days after the completion or suspension of the work. The effort to contort the very evident intention of the Legislature, to permit notice at any time, by confining it to notice *after* performance *only,* was promptly thwarted by the Supreme Court in the case of *Shenandoah R. R. Co.* v. *Miller,* supra. "The principal question sought to be raised * * * was that the notice and affidavit required by the statute must be furnished *after* and not before the entire completion of the work by the general contractor.

Obviously this is not the true construction of the statute." This very important case was decided Oct. 1st, 1885, but the cause of action arose in March, 1882, and was not affected by the amendment of 1883-4, p. 636. The agitation thereby occasioned was no doubt instrumental in bringing about that regrettable amendment, enacted pending the appeal, as follows:

1883-4.

DID AWAY WITH NOTICE ALTOGETHER.

"§ 5. Any subcontractor, or any person contracting to furnish materials about a building or other improvement, for a general contractor or other person than the owner, shall, within thirty days after such building or other improvement is completed, or work thereon otherwise terminated, furnish the owner thereof with an affidavit, showing a correct account of the amount due to said party by the contractor, and remaining unpaid to the subcontractor or person contracting to furnish materials, and said owner shall be liable for the amount of such claim to said subcontractor or persons contracting to furnish materials from the time that he shall have been furnished with such affidavit." (Approved March 17, 1884.)

No doubt vexed at the persistent effort made to misinterpret its practical and evident purpose, without awaiting the condemnation the Supreme Court was so soon to visit upon the contention, the Legislature, in what would appear, in the words of Mr. Minor, a determination to "scotch the snake," *did away with the notice altogether.* Under this amendment only the affidavit need be filed, when the owner became personally liable without regard to the state of accounts between himself and the general contractor and, but for § 6 (see *Kirn* v. *Champion* Co., 86 Va. 608, 10 S. E. p. 885), without regard to the manner in which he had done his work or furnished his materials. *Without any opportunity to protect himself* from the general contractor, the owner made that gentleman wait the expiration of the twenty days for his payment. Indubitably an end, for once, had come to the "notice dispute" of § 2479, and the Supreme Court so pronounced in the case of *Norfolk, etc., R. Co.* v. *Howison,* 81 Va. 125, 129. But a law, appealing to no justice or even expediency for its

existence, died at the hands of the revisors of the Code of 1887, when an absolutely new statute arose. Its prototype may be found in Ch. 115, § 5, Code, 1873, and in the Acts of 1869-70, the origin of the section under discussion, in Virginia.

CODE OF 1887—§ 2479.

The codifiers largely adopted the language and form of the Code of 1873, re-enacted "to be" and "probable value," added in "before performing" and "shall afterwards perform," thus emphasizing the requirement that the notice must be served *before* performance, and *only before,* but destroyed every feature of unlimited liability, which latter has never been revived, but which is not material to the point in issue.

SECTION 2479.

"Any subcontractor may give notice in writing to the owner or his agent *before* performing work for, or furnishing materials to a general contractor, stating the probable value of the work *to be* done or materials *to be* furnished; and if such subcontractor shall *afterwards perform such work or furnish such materials, and the said materials are used in the construction, repair or improvement of such building or structure,* and shall at any time after the work done or materials furnished by him and before the expiration of thirty days from the time such building or structure is completed or the work thereon otherwise terminated, furnish the owner thereof, or his agent, and also the general contractor, with a correct account, verified by affidavit, of his claim against the general contractor for the work done or materials furnished and of the amount due, the owner shall be personally liable to the claimant for the said amount, provided the same does not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given." (Italics mine.)

One, sufficiently familiar, can almost recognize the characteristic grasp and comprehensive language of the late Judge Reily. He took no chances and, possibly for this reason, his work was destined to a short life. Practically, it did not suit the occasion nor satisfy the need for which it was created, for it was not

always convenient or expedient to serve personal notice either in advance of or during performance, and it was often of practical importance to serve it after performance. No injustice could be done the owner in either case since it only bound such of the contractor's funds as he had in hand. At the session of 1893-4 (Acts, p. 523), the Legislature could not have more emphatically manifested a determination to destroy the revisors' work and return to the old plan of allowing notice to be given *before, during* and *after* performance. It cut out every word inserted by the revisors, changed "value" to "amount," and changed the whole scheme of the language by substituting the word "claim" for the word "value," so as to read "probable amount of his claim." The word "value" had heretofore always been used and at the date of the Howison case, stood alone. There seems to be persuasive, if not authoritative reason, why the change must be considered as intending, and as a determined effort at new results in keeping with the policy of the law of 1874-5 (excepting the unlimited liability clause), obviously reflected by the omission of the words "before performing work for or furnishing materials to a general contractor," and, "afterwards perform such work or furnish such materials, and the said materials are used in the construction, repair or improvement of such building or structure and shall." The statute also speaks now of the "character of his contract" and "the probable amount of his claim," which are innovations, as shown.

The amended statute is as follows:

1893-4.

"Section 2479. Any subcontractor may give notice in writing to the owner or his agent stating the nature and character of his contract and the probable amount of his claim, and if such subcontractor shall at any time after the work done or materials furnished by him and before the expiration of thirty days from the time such building or structure is completed or the work thereon otherwise terminated, furnish the owner thereof or his agent and also the general contractor with a correct account, verified by affidavit, of his claim against the general contractor for the work done or materials furnished and of the amount due,

the owners shall be personally liable to the claimant for the amount due to said contractor by the said general contractor: Provided the same does not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given or may thereafter become indebted by virtue of his contract with said general contractor." "Probable" is the sole survivor of Judge Reily's careful array of language denoting futurity. That profound lawyer and jurist was not addicted to prolixity. To contend that this *one word* left in the statute sufficiently *denotes futurity* is to lay that charge at his door.

And so the law stands to-day. It was interpreted in *Schricber* v. *Bank*, 99 Va. 257: "The court is further of the opinion that there was no error in crediting the bank with the amount due the White Hardware Co., and Cook, Clark & Co., as preferred claims to be paid in full out of the balance due from the bank. These two claims had been perfected under § 2479 and constituted a personal liability upon the bank." The opinion does not speak as to the time of the giving of the notice. Reference to the printed record on file (p. 83), shows that the notice was probably given *after* the material was furnished in the case of Cook, Clark & Company, and while being furnished in the case of White Hardware Company. But since the master's report was based upon the latter, the case is not authority.

ONLY THE WORD "PROBABLE."

There seems nothing in the way but the word "probable," the shadow that is left of the substance gone and that with new environments. In the beginning, as has been shown (Acts 1869-70), the idea of giving notice before performance *only* was written all over the Act. So in the Code of 1873. But in 1874-5 the Legislature introduced a new policy to which, it is believed, we have returned. It destroyed every vestige of words requiring notice in advance and every word that might be interpreted to imply it. It looked as if the way was clear for plain sailing and that notice might now be given at any time, when, lo, there came a prophet with the unexpected, undesired and surprising contention that the notice could *not* be given *before* performance. And, so, we have been see-sawing. The political history of the

three intervening years would no doubt prove interesting reading. Had the Legislature awaited the decision in the case of *Shenandoah R. R. Co.* v. *Miller,* supra, then pending, and not hastily passed the extreme Act of March 17th, 1884, all would have been well and the present contention would hardly have been possible; the revisors would hardly have taken the extreme stand of § 2479 of the Code of 1887 and there would have been no occasion for the drastic reversal in 1893-4, when the Legislature went back to the doctrine of 1874-5. There can be but one interpretation, "probable" or not "probable," of the intention of the Legislature in destroying the words "before performance" and "shall afterwards perform" to say nothing of omitting the words "to be" in two places, without believing that Judge Reily was prodigal with words.

SOME VIEWS ON THE SUBJECT.

Although the statute has not been before the Supreme Court except in the "Schrieber case" we are not without expressions of thought upon the exact point. The report of Special Master Jackson Guy, filed and confirmed without opposition (probably because no one was prejudiced thereby), in the case of *Brumbauch* v. *The Jefferson Hotel Co., et als.,* then pending in the United States District Court for the Eastern District of Virginia, sitting at Richmond, is reported in Pollard's Code Biennial, 1906, and may there be read. He takes a different view from that expressed herein, because the requirements of the section "denote a sequence of time in the order of the two events." He thereby supports his interpretation by establishing reciprocal relations between it and the result thereof. He assumed that the word "probable," as left, denotes futurity and gives as his reason the result of that assumption, to wit, "a sequence of time between notice and the affidavit." If he took the opposite view there would be no sequence of time. The interpretation must be had from the language of the statute and its past history, it being an amended statute. (Black Interpretation Laws, p. 360.)

MR. JOHN GARLAND POLLARD'S VIEW.

Mr. Pollard, in his Code Biennial, 1906 (§ 2479), takes issue with Mr. Guy, quotes Mr. Manson (2 Va. L. Reg. 504), and

convincingly remarks: "But in this connection it would be well to remember that the statute formerly read (Code, 1873, Ch. 115, § 5), 'probable' value of labor 'to be' performed, etc. The words in quotations were struck out by Acts, 1874-5, p. 347. In the present statute, the word 'probable' is restored, but not the words 'to be.' The use of the word 'probable' does not necessarily indicate that notice must be given before the completion of the work but only that it may be given at that time. Under the statute as it appeared in Acts, 1874-5, the word 'probable' was not used and it was doubted whether notice could be given until after the work was performed. It was important that the subcontractors should have the privilege of giving notice to owners before the work was completed in order to increase the chances of notice catching funds due the general contractor, in the hands of the owner. If the subcontractor had to wait until the work was completed as it might seem he would have to do * * * until the word 'probable' was reinserted * * * he would have lost his remedy by reason of the fact that the owner might have settled with the general contractor before receiving notice." Mr. Manson, in his article in 2 Va. L. Reg., in commenting on the statute in its present state, says that "it is by no means certain that a notice that found the owner with funds in his hands due the general contractor would be held bad, because it came after the completion of the work or the furnishing of material." "There can certainly be no good reason for allowing the subcontractor who can only state the 'probable' amount of his claim to look to the owner, while that privilege is denied to the subcontractor whose work is actually done and whose claim is no longer 'probable' but certain and whose notice catches funds in the hands of the owner, belonging to the general contractor."

It is as apparent that both Mr. Pollard and Mr. Manson believe that notice served after performance is good, as that Mr. Guy's opinion is based upon the leaving in the statute the word "probable" after there had been omitted the words "to be" and other equally strong language denoting futurity, such as "and shall afterwards furnish." He took no notice of other change of language nor its peculiar history, but allowed that one word to fix his opinion. Mr. Guy grants that the word may mean "approximate." The occasion demands the services of no philologist

to furnish the etymology of the word so long as the unquestioned intention of the Legislature may be read in the wreck of the old statute. Judge Reily prepared the old statute. The Virginia Legislature changed it. Under the circumstances, one prefers attributing to the Legislature an intention to *alter* an existing *law*, rather than practice in English exercises, though the latter be not without its uses.

THE RULING THOUGHT.

The ruling thought and the final analysis is that the amendment did not take away, nor was it intended to take away, but added to the benefits already conferred by the statute upon the mechanic. That is an irresistible conclusion which, if carried into effect, can produce but one result, although the rule in "Shelly's case" is not believed to have so clouded the legal heavens as this little word "probable," or fomented more vexatious litigation in the nisi prius courts.

ENTIRELY DISSIMILAR FROM LIENS.

It will be helpful to be mindful that "this is a remedy entirely disconnected from and additional to the remedy by lien upon the building and should be regarded with favor by the courts. It does not depend upon the right to enforce a mechanic's lien or upon the completion of the principal contract by the contractor. A recovery of judgment against the contractor does not destroy the rights acquired by the notice. The subcontractor acquires no general lien on the whole fund in the owner's hands, but what amounts to a specific appropriation of a part sufficient to pay his amount." It is an assignment *pro tanto* of that which is due him. While he could not perfect his mechanic's lien against a public building, he can, by this section, secure payment for work done upon such building, if the municipality holds sufficient of the contractor's funds in hand upon receipt of the notice. With the registry laws it is not concerned; no person is directly interested except the owner, the general contractor and the subcontractors and no question of public policy is involved. *Bates* v. *St. Barbara County*, 90 Cal. 543, 27 Pac. 438; *Roe* v. *Scanlan*, 98 Ky. 24, 32 S. W. 216; *Mckee* v. *Rapp*. 35 N. Y. Sup. 175.

AS TO THE NOTICE.

The section requires only that the "subcontractor may *give* notice in writing." If, therefore, such notice in writing reaches the owner as is sufficient to carry conviction of the subcontractor's intent, it is believed to be binding and sufficient. The courts construe it as the act of the mechanics and not of lawyers. *St. Louis & P. R. R.* v. *Kerr,* (Ill.), 38 N. E. 642. In *Bassett* v. *Bertorelli* (Tenn.), 22 S. W. 424, it was held that the notice was not process but "merely a private instrument in writing" and so far "as its form" and "the manner in which it is given" is concerned it is sufficient if defendant received it and "it gave him the required notification." "The leaving of the notice with the defendant by a private individual, as the agent of the complainants, was likewise all that the law required in that respect. It had the same virtue as regular service by an officer would have had. The notice required by statute is not process. It is merely a private instrument in writing."

THOMAS WALL SHELTON.